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No. 1080

In the Supreme Court of the United States

OCTOBER TERM, 1967

HEWLETT-PACKARD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General

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The Department of the Air Force awarded several negotiated firm fixed-price contracts to Hewlett-Packard Company for standard commercial electronic equipment of a type also sold by the company in substantial quantities to the general public. The contract prices were determined on the basis of Hewlett-Packard's listed catalogue prices, less volume discounts. The contracts were negotiated pursuant to Chapter 137, 10 U.S.C. 2301–2314, entitled "Procurement Generally," which provides (10 U.S.C. 2313(b)) that each contract negotiated under the chapter:

> shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to ex-

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> amine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

Accordingly, the contracts between the government and Hewlett-Packard provided that the Comptroller General and his representatives had the right to examine:

> any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

On the basis of this contractual language, representatives of the Comptroller General requested access to all books and records of Hewlett-Packard relating to the costs it incurred in producing the articles furnished under the contracts. The company refused this request, and the United States then commenced this action to enforce the Comptroller General's rights to examine those items. The district court entered judgment for the United States, and the court of appeals affirmed.

Petitioners' basic contention is that because the contract prices were to be determined on the basis of fixed catalogue prices less a volume discount, rather than on a cost-plus basis, the Comptroller General had no right to information relating to Hewlett-Packard's cost of production. Thus, they argue that the language of 10 U.S.C. 2313(b) giving the Comptroller General the right to examine any records "that * * * pertain to * * * the contract" is limited to the specific terms and conditions of the agreement between the parties

and does not refer to the general subject matter of the contract.

Petitioners' argument misconceives the purpose for which the Comptroller General was given the authority to examine records relating to government contracts. One of the statute's major purposes was to "deter those persons who otherwise might abuse the authority to negotiate certain contracts without advertising." S. Rep. No. 603, 82d Cong., 1st Sess., pp. 2–4. In expressing his view as to the merit and propriety of the proposed legislation, the then Acting Comptroller General assured the chairmen of the House and Senate Committees on Expenditures in the Executive Departments that any abuses discovered by the General Accounting Office in exercising the authority conferred by the legislation would be promptly brought to the attention of the proper officials, and, if warranted, to Congress' attention as well. *Ibid.*

Thus, contrary to petitioners' suggestions (Pet. 9–10), it is immaterial that the cost data sought by the Comptroller General was not needed by the government when it negotiated the contracts here involved in order to determine whether there has been compliance with the terms of these contracts. While the government may not be able to use the data sought to affect rights and obligations arising under the particular contracts here involved, it will be able to use that data for other relevant purposes. For example, on the basis of his examination of the company's cost data, the Comptroller General may conclude that the government has been paying too high a price for such

standard articles of commerce, and recommend that in the future such articles should be procured by means of formal advertising rather than by negotiations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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